BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROD L. BLUMA Claimant	)	
VS.	)	
	)	**DOCKET NO. 222,083**
SOUTHWEST PUBLISHING Respondent	)	
AND	)	
HARTFORD ACCIDENT AND INDEMNITY CO. Insurance Carrier	)	

ORDER

Claimant requested review of the February 13, 2003 Award of Administrative Law Judge Brad E. Avery. The Board heard oral argument on August 5, 2003.

APPEARANCES

Bruce A. Brumley of Topeka, Kansas, appeared for the claimant. Seth Valerius of Topeka, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award, with one exception. During oral argument, respondent's counsel admitted notice was given within the statutorily prescribed time period. Thus, notice was no longer an issue for determination.

ISSUES

The claimant alleges both a hearing loss and a resulting psychological injury as a result of his employment with the respondent. The Administrative Law Judge (ALJ) determined the claimant failed to prove that his alleged injury arose out of and occurred in the course of his employment with respondent. That is the issue presented for the Board's review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed.

Claimant had been employed for respondent since 1988 repairing and troubleshooting the printing machines. This position did not require claimant to be in close proximity to the printing machines for eight (8) hours a day. Rather, he would at times be required to be next to the machines while they were operating in order to ascertain the nature of the mechanical problem. Other times he would be working on the machines while they were not in use. Overall, he was required to be in the area of the presses on average 4-6 hours per week. The balance of his work day was spent elsewhere in the plant or in his office.

Claimant alleges he sustained a series of accidents over a period of time, culminating in December of 1996, when he was terminated for what his employer described as sexual harassment of a female co-employee. Prior to his termination, claimant testified that he notified respondent in writing of his hearing problem in February of 1995 and May of 1996. According to him, not only was he having difficulty hearing, he was suffering from tinnitus. Although respondent does not deny receiving these written notices, no action was taken by either claimant or respondent in response.

Claimant also alleges that he made a complaint to the Occupational Safety and Health Administration (OSHA) about the noise levels in the plant. Although it is unclear if it was done in response to any such complaint, respondent conducted a study of the noise levels within the plant and ultimately implemented a hearing protection program in the fall of 1996, before claimant was terminated. Once they received the results of that study, respondent began providing ear protection for those employees who were stationed at the machines. Apparently, the OSHA regulations compel hearing protection for those who are stationed around the printing machines eight (8) hours per day. All others in the plant are not required to use hearing protection.

The printing department manager, Eric Bohn, testified claimant did not meet the criteria for ear protection as he was only around the machines sporadically. Moreover, it is uncontroverted that when claimant was offered a hearing test, he declined the offer telling his supervisor he had lost his hearing before he had begun working for respondent. Indeed, the supervisor had worked with claimant since April of 1990 and noticed claimant had difficulty hearing during normal conversations.

After claimant was terminated, he filed this claim and sought treatment. Respondent referred claimant to an occupational facility. There Dr. Couch confirmed some degree of hearing loss and suggested claimant be seen and evaluated by an audiologist for a more complete diagnosis. He then went to see Song Ping Lee, M.D. in April of 1999,

Dr. Lee diagnosed bilateral mixed type hearing loss, mostly likely otosclerosis with noise-induced loss and tinnitus, with the right ear having sustained more damage than the left. He suggested claimant should utilize hearing aids in both ears (which claimant now chooses not to do) and use ear protection when working in noisy environments.

In February of 2000, claimant was seen by Jeanne Frieman, M.D., a licensed psychologist to evaluate his psychological complaints. At this point his complaints included irritability, inability to sleep, tenseness and nervousness. Following her examination, she concluded claimant was depressed and had a generalized anxiety disorder due to what she believed was a rather significant hearing loss.

With this recommendation, the claimant requested a Preliminary Hearing. At the conclusion of that proceeding, the ALJ ordered claimant to be seen by Peter Bieri, M.D. for an independent medical examination. Dr. Bieri saw claimant on July 14, 2000 and confirmed the bilateral hearing loss which resulted in poor aural discrimination skills along with a complaint of persistent ringing in both ears with equal intensity. According to Dr. Bieri, claimant had found the hearing aids to provide little benefit and as a result, chose not to wear them. Claimant also denied any significant limitations due to active psychiatric disease, although he did describe an irritability due to his inability to hear, understand and communicate.

At the conclusion of the examination, Dr. Bieri issued a report which indicated he believed claimant had a whole body impairment of 18 percent. However, a portion of this rating was the result of physiological causes and not due to the work environment. After subtracting the conductive component, claimant is left with a 6 percent whole body impairment due to noise-induced hearing loss and an additional 4 percent whole body impairment for the tinnitus, which when combined yields a 10 percent. Of that 10 percent, 7 percent of the impairment attributable to the noise-exposure over the 9 year period in respondent's employ. The balance of 3 percent was, in his view, attributable to non-occupational, recreational noise exposure including, auto racing and motorcycles. Dr. Bieri recommended claimant utilize hearing protection as a means of preserving what hearing remains. Dr. Bieri also indicated that he did not believe claimant met the criteria for any impairment on a psychiatric basis.

It is worth noting that Dr. Bieri has no personal experience or knowledge regarding the actual noise levels within respondent's printing plant.

Dr. Frieman saw claimant again in February of 2000 and lastly in January of 2001. She was then asked to provide an opinion as to claimant's psychological impairment. Dr. Frieman indicated claimant bears a 16.25 percent permanent impairment. This figure is derived from her evaluation of four (4) areas of social functioning. The numerical results of those responses are averaged together and result in the 16.25 percent figure. This impairment evaluation was made not only with the help of the 4th Edition of the American

Medical Ass'n. *Guides to the Evaluation of Permanent Impairment (Guides)*, but also with the aid of the 2nd Edition of the *Guides*, as suggested within the 4th Edition.

In response to the opinions expressed by Dr. Frieman, respondent referred claimant to Michael J. Pronko, M.D., a licensed psychiatrist. Dr. Pronko originally had an appointment to see claimant in October of 2002 but claimant failed to appear. The appointment was rescheduled for November 6, 2002. At that time, claimant met with Dr. Pronko for a two hour period and following this meeting, claimant was asked to complete some additional diagnostic questionnaires and return them to Dr. Pronko's office.

During the course of the appointment, Dr. Pronko noticed that claimant initially demonstrated a marked inability to hear, leaning forward and using a loud voice. As the meeting progressed, Dr. Pronko testified that he continued to use the same volume of voice and claimant was able to effectively communicate with no difficulty. There was no leaning forward, no cupping of his hand to ear, as he had done during the initial minutes of the meeting with Dr. Pronko. The two conversed for the two hour period and claimant's answers were appropriate, although claimant continually referred to his hearing loss and his resulting difficulties.

At the conclusion of the meeting and following his evaluation of the questionnaires, Dr. Pronko concluded claimant's classification or diagnosis was that of malingering. While he conceded claimant demonstrated some elements of depression and anxiety, he did not believe these rose to a diagnosable level nor that claimant sustained any type of psychological damage as a result of his hearing loss. Other than the need to utilize some sort of hearing protection when engaging in his usual activities such as hunting, fixing of motors and when in noisy environments, he was free to do whatever he wanted to do.

In an effort to address work disability under K.S.A. 44-510e(a), claimant met with Dick Santner and Monty Longacre, both vocational rehabilitation specialists. These individuals identified 17 (Santner) to 28 (Longacre) tasks previously performed by claimant during the last 15 years of his vocational life. Dr. Bieri determined claimant bore a 70.6 percent task loss based upon Mr. Santner's task analysis.

Since leaving respondent's employ, claimant has been self-employed as a mechanic, working in a garage next to his home. He testified that he makes, at best, $5000 - 7,000 per year in this endeavor. Claimant does not advertise his business. He continues to hold a commercial driving license. Although he indicates he sought work for a few months following his termination in December of 1996, he has done nothing to try to find other work since that time and even indicates he prefers working for himself.

It is clear from the ALJ's Award that he thoroughly reviewed the evidence offered by the parties and was not persuaded that claimant's hearing loss was in any way related to his work activities. In considering and ultimately rejecting Dr. Bieri's opinion regarding causation, the ALJ noted that "the doctor [Bieri] conceded that without a hearing test of the

claimant prior to beginning work at Southwest, he could not testify to a reasonable degree of medical certainty that any hearing loss resulted from claimant's work for the respondent." Judge Avery went on to indicate that other factors support his rejection of Dr. Bieri's opinion:

> 1) Claimant's concern for his hearing loss apparently did not arise until after he was terminated in December of 1996 for alleged sexual harassment of a female employee. He had worked for Southwest Publishing since September of 1988 and testified that his hearing problems began in 1994 or 1995. However, as noted, his supervisor believed his hearing problem had existed much longer than that, which is consistent with claimant's own remarks to the supervisor.
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> 2) Claimant was found to be a malingerer by respondent's psychiatrist, Dr. Pronko. Dr. Pronko based his assessment, in part, on his observation that claimant began their conversation by leaning forward and indicating he could not hear. However, as time passed claimant no longer exhibited those behaviors and was able to hear what the doctor said. Dr. Pronko's conclusion cast severe doubt upon claimant's credibility regarding the extent of his condition, which Dr. Bieri relied upon in part arriving at his conclusions.
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> 3) Claimant had substantial exposure to loud noise levels that were not premised at Southwest Publishing, such as his hobby of working on race cars. Dr. Bieri recognized this fact in his apportionment. However, the doctor was not familiar with the actual noise level at Southwest Publishing. Consequently, the court does not believe that it could be reasonably concluded what, if any, portion of claimant's hearing loss was attributable to claimant's work for respondent, based upon the evidence in the record. (Award, p. 3-4)

Claimant must establish that his personal injury was caused by an accident arising out of and in the course of employment. K.S.A. 44-501(a); see *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 245, 689 P.2d 871 (1984). The phrase "arising out of" employment requires some causal connection between the injury and the employment. *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 302, 303 P.2d 197 (1956). The question of whether a worker's disability is due to a personal injury by accident arising out of and in the course of his or her employment is a question of fact. *Buck v. Beech Aircraft Corporation*, 215, Kan. 157, 160, 523 P.2d 697 (1974). In this instance the ALJ found the claimant failed to meet his burden of proof in this matter. The Board agrees and affirms.

AWARD

WHEREFORE, it is the finding of the Board that the Award entered by Administrative Law Judge Brad E. Avery dated February 13, 2003 is hereby affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
Seth Valerius, Attorney for Respondent and Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Director Workers Compensation